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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 ANTAYA L. MACK,)
7 Plaintiff,) No. CV-08-00234-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on May 15, 2009. (Ct. Rec. 13,
15 16). Attorney Maureen J. Rosette represents Plaintiff; Special
16 Assistant United States Attorney Stephanie R. Martz represents the
17 Commissioner of Social Security ("Commissioner"). The parties
18 have consented to proceed before a magistrate judge. (Ct. Rec. 7.)
19 On May 5, 2009, plaintiff filed a reply. (Ct. Rec. 18.) After
20 reviewing the administrative record and the briefs filed by the
21 parties, the court **GRANTS** Defendant's Motion for Summary Judgment
22 (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment
23 (Ct. Rec. 13).

24 **JURISDICTION**

25 Plaintiff protectively filed applications for disability
26 insurance benefits (DIB) and supplemental security income (SSI)
27 benefits on March 1, 2005, initially alleging symptoms related to
28

1 a mental breakdown, bipolar disorder and migraine headaches.
2 Plaintiff later alleged she suffered from more manic episodes, as
3 well as back and neck pain. (Tr. 84-88, 98, 125, 133, 144, 292-
4 294,.) Both applications allege onset as of November 9, 2004.
5 (Tr. 84, 292.) The applications were denied initially and on
6 reconsideration. (Tr. 37-38, 45-47, 284-285, 287-290.)
7 At a hearing before Administrative Law Judge (ALJ), Paul L.
8 Gaughen on October 17, 2007, and continued to January 17, 2008,
9 plaintiff, represented by counsel, vocational expert K. Diane
10 Kramer, and Kay Mack, plaintiff's mother, testified. (Tr. 299-
11 308, 311-342.) On March 8, 2008, the ALJ issued an unfavorable
12 decision. (Tr. 16-26.) The Appeals Council received additional
13 evidence and denied a request for review on June 26, 2008. (Tr.
14 4-8.) Therefore, the ALJ's decision became the final decision of
15 the Commissioner, which is appealable to the district court
16 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for
17 judicial review pursuant to 42 U.S.C. § 405(g) on July 21, 2008.
18 (Ct. Rec. 1, 4.)

19 **STATEMENT OF FACTS**

20 The facts have been presented in the administrative hearing
21 transcripts, the ALJ's decision, the briefs of both Plaintiff and
22 the Commissioner, and are summarized here.

23 Plaintiff was 25 years old at onset and 28 at the time of the
24 hearing. (Tr. 305.) She has a high school education and one and
25 a half years of college. (Tr. 318.) Plaintiff has worked as an
26 administrative clerk, sales coordinator and portfolio manager,
27 among other positions. (Tr. 64, 120, 222.) She testified she
28 worked 20 hours per week, and works as a volunteer youth leader in

1 her church. (Tr. 323.) Plaintiff was having headaches daily for
2 two months prior to the hearing, but they only affected her
3 concentration "a little." (Tr. 323-324.) Side effects from
4 medication include moodiness, exhaustion, and occasionally
5 becoming short tempered. (Tr. 324.) Plaintiff's hobbies include
6 dancing, shopping and reading. (Tr. 325.) Plaintiff sleeps
7 eight hours in an average night but feels exhausted. (Tr. 320-
8 323, 326.)

9 SEQUENTIAL EVALUATION PROCESS

10 The Social Security Act (the "Act") defines "disability"
11 as the "inability to engage in any substantial gainful activity by
12 reason of any medically determinable physical or mental impairment
13 which can be expected to result in death or which has lasted or
14 can be expected to last for a continuous period of not less than
15 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
16 Act also provides that a Plaintiff shall be determined to be under
17 a disability only if any impairments are of such severity that a
18 plaintiff is not only unable to do previous work but cannot,
19 considering plaintiff's age, education and work experiences,
20 engage in any other substantial gainful work which exists in the
21 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
22 Thus, the definition of disability consists of both medical and
23 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
24 (9th Cir. 2001).

25 The Commissioner has established a five-step sequential
26 evaluation process for determining whether a person is disabled.
27 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
28 is engaged in substantial gainful activities. If so, benefits are

1 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
2 not, the decision maker proceeds to step two, which determines
3 whether plaintiff has a medically severe impairment or combination
4 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
5 416.920(a)(4)(ii).

6 If plaintiff does not have a severe impairment or combination
7 of impairments, the disability claim is denied. If the impairment
8 is severe, the evaluation proceeds to the third step, which
9 compares plaintiff's impairment with a number of listed
10 impairments acknowledged by the Commissioner to be so severe as to
11 preclude substantial gainful activity. 20 C.F.R. §§
12 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
13 App. 1. If the impairment meets or equals one of the listed
14 impairments, plaintiff is conclusively presumed to be disabled.
15 If the impairment is not one conclusively presumed to be
16 disabling, the evaluation proceeds to the fourth step, which
17 determines whether the impairment prevents plaintiff from
18 performing work which was performed in the past. If a plaintiff
19 is able to perform previous work, that Plaintiff is deemed not
20 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
21 At this step, plaintiff's residual functional capacity ("RFC")
22 assessment is considered. If plaintiff cannot perform this work,
23 the fifth and final step in the process determines whether
24 plaintiff is able to perform other work in the national economy in
25 view of plaintiff's residual functional capacity, age, education
26 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
27 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

28 The initial burden of proof rests upon plaintiff to establish

1 a *prima facie* case of entitlement to disability benefits.
2 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
3 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
4 met once plaintiff establishes that a physical or mental
5 impairment prevents the performance of previous work. The burden
6 then shifts, at step five, to the Commissioner to show that (1)
7 plaintiff can perform other substantial gainful activity and (2) a
8 "significant number of jobs exist in the national economy" which
9 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
10 Cir. 1984).

11 STANDARD OF REVIEW

12 Congress has provided a limited scope of judicial review of a
13 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
14 the Commissioner's decision, made through an ALJ, when the
15 determination is not based on legal error and is supported by
16 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
17 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
18 1999). "The [Commissioner's] determination that a plaintiff is
19 not disabled will be upheld if the findings of fact are supported
20 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
21 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
22 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
23 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
24 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
25 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
26 573, 576 (9th Cir. 1988). Substantial evidence "means such
27 evidence as a reasonable mind might accept as adequate to support
28 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)

1 (citations omitted). "[S]uch inferences and conclusions as the
2 [Commissioner] may reasonably draw from the evidence" will also be
3 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
4 On review, the Court considers the record as a whole, not just the
5 evidence supporting the decision of the Commissioner. *Weetman v.*
6 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
7 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

8 It is the role of the trier of fact, not this Court, to
9 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
10 evidence supports more than one rational interpretation, the Court
11 may not substitute its judgment for that of the Commissioner.
12 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
13 (9th Cir. 1984). Nevertheless, a decision supported by
14 substantial evidence will still be set aside if the proper legal
15 standards were not applied in weighing the evidence and making the
16 decision. *Browner v. Secretary of Health and Human Services*, 839
17 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
18 evidence to support the administrative findings, or if there is
19 conflicting evidence that will support a finding of either
20 disability or nondisability, the finding of the Commissioner is
21 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
22 1987).

23 ALJ'S FINDINGS

24 At the outset, the ALJ found plaintiff met the DIB
25 requirements through December 31, 2009. (Tr. 18.) The ALJ found at
26 step one that although plaintiff earned some income after onset,
27 she has not engaged in substantial gainful activity. (Tr. 18.)
28 At steps two and three, the ALJ found that plaintiff suffers from

1 affective disorder with bipolar features and panic disorder
2 without agoraphobia, impairments that are severe but which do not
3 alone or in combination meet or medically equal a Listing
4 impairment. (Tr. 18, 22.) The ALJ found plaintiff less than
5 completely credible. (Tr. 24.) At step four, relying on the VE,
6 the ALJ found plaintiff's RFC for a full range of work, with
7 slight to no mental limitations, enables her to perform past
8 relevant work. Some past positions within her RFC include
9 administrative clerk, collection associate/clerk, sales
10 trainer/sales agent, sales coordinator (banking), and portfolio
11 manager (registered representative). (Tr. 23, 25.) Because the
12 ALJ found plaintiff could perform past relevant work, she was
13 found not disabled at step four. (Tr. 25.) Accordingly, the ALJ
14 found that plaintiff is not disabled as defined by the Social
15 Security Act. (Tr. 25-26.)

16 ISSUES

17 Plaintiff contends that the Commissioner erred as a matter of
18 law by failing to (1) properly weigh the evidence of psychological
19 impairment; and (2) properly assess her credibility. (Ct. Rec. 14
20 at 10-15.) The Commissioner responds that the ALJ appropriately
21 weighed the evidence asks the Court to affirm his decision. (Ct.
22 Rec. 17 at 2, 12-13).

23 DISCUSSION

24 In social security proceedings, the claimant must prove the
25 existence of a physical or mental impairment by providing medical
26 evidence consisting of signs, symptoms, and laboratory findings;
27 the claimant's own statement of symptoms alone will not suffice.
28 20 C.F.R. § 416.908. The effects of all symptoms must be

1 evaluated on the basis of a medically determinable impairment
2 which can be shown to be the cause of the symptoms. 20 C.F.R. §
3 416.929. Once medical evidence of an underlying impairment has
4 been shown, medical findings are not required to support the
5 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
6 341, 345 (9th Cir. 1991).

7 A treating physician's opinion is given special weight
8 because of familiarity with the claimant and the claimant's
9 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
10 Cir. 1989). However, the treating physician's opinion is not
11 "necessarily conclusive as to either a physical condition or the
12 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
13 751 (9th Cir. 1989) (citations omitted). More weight is given to
14 a treating physician than an examining physician. *Lester v.*
15 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
16 weight is given to the opinions of treating and examining
17 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
18 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
19 physician's opinions are not contradicted, they can be rejected
20 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
21 If contradicted, the ALJ may reject an opinion if he states
22 specific, legitimate reasons that are supported by substantial
23 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
24 F. 3d 1435, 1463 (9th Cir. 1995).

25 In addition to the testimony of a nonexamining medical
26 advisor, the ALJ must have other evidence to support a decision to
27 reject the opinion of a treating physician, such as laboratory
28 test results, contrary reports from examining physicians, and

1 testimony from the claimant that was inconsistent with the
2 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
3 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
4 Cir. 1995).

5 Plaintiff contends that the ALJ failed to properly credit
6 the opinion of Brooke Sjostrom, MS, LMHC and Mahlon Dalley, Ph.D.,
7 following plaintiff's February 23, 2005, evaluation. (Ct. Rec. 14
8 at 10-13, referring to Tr. 229-237.) Ms. Sjostrom diagnosed
9 bipolar II disorder and panic disorder without agoraphobia. She
10 assessed marked limitations in the ability to relate appropriately
11 to co-workers and supervisors, interact appropriately in public
12 places, and respond appropriately to and tolerate the pressures
13 and expectations of a normal work setting. (Tr. 232, 236.)

14 The ALJ points out Ms. Sjostrom opined plaintiff's marked
15 impairments would improve and stabilize with treatment, and when
16 that took place she expected plaintiff would be able to return to
17 her previous line of work. (Tr. 19, referring to Tr. 232.) At
18 the time of this evaluation, plaintiff was taking no medication
19 and was not otherwise receiving mental health treatment. (Tr.
20 229.) Ms. Sjostrom assessed a current GAF of 59.¹ (Tr. 232.)

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23 A Global Assessment of Functioning (GAF) of 59 indicates
24 moderate symptoms (e.g., flat affect and circumstantial speech,
25 occasional panic attacks) or moderate difficulty in social,
26 occupational or school functioning (e.g., few friends, conflicts
27 with peers or co-workers). DIAGNOSTIC AND STATISTICAL MANUAL OF
28 MENTAL DISORDERS FOURTH EDITION (DSM-IV), at p. 32.

1 It appears Ms. Sjostrom's opinion that plaintiff's symptoms
2 would resolve with treatment was correct. On October 25, 2005,
3 about eight months later, treating physician Jan Mueller, M.D.,
4 notes plaintiff feels "well controlled at current medications" for
5 her bipolar disorder. (Tr. 160.) Dr. Mueller diagnosed bipolar
6 affective disorder, mixed, unspecified; migraine; cervical pain;
7 insomnia (transient), and excess sweating. (Tr. 160.)

8 To the extent the ALJ rejected the marked impairments
9 assessed by Ms. Sjostrom, he did so because Ms. Sjostrom expected
10 plaintiff's symptoms to fully resolve with treatment. This reason
11 is specific, legitimate, and fully supported by the evidence.

12 The ALJ considered the records and opinions of treating
13 providers Dr. Mueller, Patricia Carlson, ARNP, Stacey Mainer,
14 ARNP, Carol Miller, ARNP, and Bill Martin, RN. (Tr. 19-22, 24-25.)
15 The ALJ notes Dr. Mueller reported as early as April of 2005
16 plaintiff's bipolar disorder was well controlled. (Tr. 24.) He
17 notes too that in a follow up appointment in June of 2005,
18 plaintiff reported her migraines were very well controlled, and
19 although she continued to have occasional racing thoughts, her
20 depressive symptoms were under excellent control. (Tr. 24.)

21 The ALJ observes Nurse Carlson's note that plaintiff's mania
22 increased in July of 2005, and medications were adjusted. (Tr.
23 24.) Significantly, Nurse Carlson "reported this was due to
24 becoming upset that her SSI case might be affected by a change in
25 schedule." (Tr. 24, referring to Tr. 173.) Nurse Carlson
26 indicates that plaintiff declined an offer of a support group even
27 though it is within walking distance of plaintiff's home. (Tr.
28 173.) The ALJ notes Nurse Carlson assessed a GAF of 60-70

1 indicating moderate symptoms. (Tr. 24, referring to Tr. 173.)

2 The ALJ notes that the next month, August of 2005, plaintiff
3 told Dr. Mueller she felt well balanced and satisfied in general.
4 (Tr. 24, referring to Tr. 168.) In September of 2005, plaintiff's
5 bipolar symptoms were well controlled, although she suffered
6 medication side effects of hair loss and tremor. (Tr. 24,
7 referring to Tr. 162.) Records indicate that in March of 2006,
8 plaintiff's bipolar disorder was well controlled. (Tr. 24,
9 referring to Tr. 251.) Similarly, the ALJ notes that in December
10 of 2006, plaintiff's bipolar disorder continued to be well
11 managed, and she denied depression or anxiety. (Tr. 24, referring
12 to Tr. 255.) Plaintiff's mania and racing thoughts increased in
13 September of 2007 when she stopped taking medications for
14 financial reasons. Medication was restarted. (Tr. 24, referring
15 to Tr. 276, dated October 26, 2007.) Plaintiff told Nurse Martin
16 she had not been depressed since 2004. He assessed a GAF of 70-
17 80, indicating only mild symptoms. (Tr. 272.)

18 The ALJ notes the records indicate plaintiff's headaches and
19 mental health problems have continually improved on medication,
20 with relapses only when medications are stopped. (Tr. 24.) The
21 ALJ also observes that plaintiff's ability to work (although part-
22 time) in late 2006 and through 2007 indicates improved functioning
23 overall.

24 The ALJ was persuaded by the medical and other evidence when
25 he assessed plaintiff's physical and psychological impairments.
26 There is no evidence in the medical record that plaintiff's
27 condition worsened.

28 To further aid in weighing the conflicting medical evidence,

1 the ALJ evaluated plaintiff's credibility and found her less than
2 fully credible. (Tr. 24.) Credibility determinations bear on
3 evaluations of medical evidence when an ALJ is presented with
4 conflicting medical opinions or inconsistency between a claimant's
5 subjective complaints and diagnosed condition. See *Webb v.*
6 *Barnhart*, 433 F. 3d 683, 688 (9th Cir. 2005).

7 It is the province of the ALJ to make credibility
8 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
9 1995). However, the ALJ's findings must be supported by specific
10 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
11 Cir. 1990). Once the claimant produces medical evidence of an
12 underlying medical impairment, the ALJ may not discredit testimony
13 as to the severity of an impairment because it is unsupported by
14 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
15 1998). Absent affirmative evidence of malingering, the ALJ's
16 reasons for rejecting the claimant's testimony must be "clear and
17 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
18 "General findings are insufficient: rather the ALJ must identify
19 what testimony not credible and what evidence undermines the
20 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
21 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

22 The ALJ relied on several factors when he assessed
23 credibility: inconsistent statements, improvement when taking
24 prescribed medication, and activities inconsistent with the degree
25 of impairment alleged, including the ability to work part-time,
26 volunteer, and dance. (Tr. 24.) As the ALJ concludes, there are
27 few, if any, medical, behavioral health or self-reports to support
28 plaintiff's testimony that she is unable to perform full time

1 work. (Tr. 24.)

2 Plaintiff's activities, as noted, include working 20 hours
3 per week, volunteering as a youth leader in her church, washing
4 dishes, laundry, cleaning, cooking, shopping, driving, dancing and
5 going to church weekly. (Tr. 118, 120-122, 321-325.)

6 The ALJ notes Plaintiff testified she could not stand the
7 pressures of full time work due to severe headaches and fatigue.
8 (Tr. 24). The record does not support her assertion, as the ALJ
9 points out:

10 . . . the record consistently indicates that after
11 the original diagnosis of bipolar disorder in January
12 2005, she had continued improvement in her symptoms
13 with treatment, beginning in March 2005. As early as
14 April 2005, Dr. Mueller reported her [plaintiff's]
15 bipolar disorder was well controlled. In follow up
16 in June 2005, she reported to Dr. Mueller that her
17 migraines were very well controlled and although she
18 continued to have occasional racing thoughts, her
19 depressive symptoms were under excellent control.
20 There was a period of increased mania in July 2005,
21 and her medications had to be adjusted, however,
22 Nurse Carlson reported this was due to becoming upset
23 that her SSI case might be affected by a change in
24 schedule. Group resources were offered at that time,
25 however, she declined. Nurse Carlson assessed global
26 assessment of functioning of 60-70 indicating moderate
27 symptoms. By August 2005, she told Dr. Mueller she felt
28 well balanced and satisfied in general. In follow up
in September 2005, she had some side effects of
medication, including tremor and hair loss; otherwise,
her symptoms were well controlled. In follow up in March
2006, her bipolar disorder was well controlled.

(Tr. 24.)

23 The ALJ is correct that when plaintiff failed to take
24 medication for headaches as prescribed, allegedly due to lack of
25 funds, symptoms increased. (Tr. 24.) Symptoms which are well
26 controlled on medication do not support finding disabling
27 impairments.

28 The ALJ's reasons for finding plaintiff less than fully

1 credible are clear, convincing, and fully supported by the record.
2 See *Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9th Cir.
3 2002)(proper factors include inconsistencies in plaintiff's
4 statements, inconsistencies between statements and conduct, and
5 extent of daily activities). Noncompliance with medical care or
6 unexplained or inadequately explained reasons for failing to seek
7 medical treatment also cast doubt on a claimant's subjective
8 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.
9 2d 597, 603 (9th Cir. 1989).

10 To the extent the ALJ rejected the contradicted opinions of
11 some of the professionals, his reasons are legitimate, specific,
12 and supported by substantial evidence in the record. See *Lester*
13 *v. Chater*, 81 F. 3d 821, 830-831 (9th Cir. 1995) (holding that the
14 ALJ must make findings setting forth specific, legitimate reasons
15 for rejecting the treating physician's contradicted opinion).

16 The ALJ is responsible for reviewing the evidence and
17 resolving conflicts or ambiguities in testimony. *Magallanes v.*
18 *Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
19 trier of fact, not this court, to resolve conflicts in evidence.
20 *Richardson*, 402 U.S. at 400. The court has a limited role in
21 determining whether the ALJ's decision is supported by substantial
22 evidence and may not substitute its own judgment for that of the
23 ALJ, even if it might justifiably have reached a different result
24 upon de novo review. 42 U.S.C. § 405 (g).

25 The ALJ's finding that plaintiff's headaches are not a severe
26 impairment, because successfully treated with medication, is
27 supported by the record.

28 The ALJ's assessment of the medical evidence and of

1 plaintiff's credibility is supported by the record and free of
2 legal error.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's conclusions, this
5 court finds that the ALJ's decision is free of legal error and
6 supported by substantial evidence..

7 **IT IS ORDERED:**

8 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is
9 **GRANTED.**

10 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
11 **DENIED.**

12 The District Court Executive is directed to file this Order,
13 provide copies to counsel for Plaintiff and Defendant, enter
14 judgment in favor of Defendant, and **CLOSE** this file.

15 DATED this 18th day of May, 2009.

16 s/ James P. Hutton
17 JAMES P. HUTTON
18 UNITED STATES MAGISTRATE JUDGE
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